

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

MATTHEW THOMPSON,

Plaintiff,

v.

Case No.: 4:14-cv-465-RH-GRJ

B. SMITH, et al.,

Defendants.

**OPPOSED MOTION TO COMPEL
RELEASE OF MEDICAL RECORDS**

Defendants **Smith, Sikes, and Price** (“Defendants”) through undersigned counsel and pursuant to Northern District Local Rule 26.1 (d), respectfully move for an order compelling the Plaintiff to release his medical and mental health records, and state:

Statement of Facts

1. In his second amended complaint, Plaintiff alleges that he was sprayed with chemical agents by Smith or Sikes. [Doc. 47]. Furthermore, this Court found in its Order Dismissing the Second Amended Complaint in Part, that “[t]he report and recommendation concludes that the second amended complaint does not adequately allege that the spraying caused physical injury to Mr.

Thompson, but the very reason that officers are equipped with chemicals is that their application causes substantial physical discomfort. The First and Eighth Amendment claims against Mr. Smith and Mr. Sikes, including the demand for damages, may go forward.” [Doc. 55 at 2].

2. Plaintiff has placed his medical condition and the notations in his medical records at issue in this action. Furthermore, Plaintiff’s current state of mind and his state of mind at the time of the incident are also relevant to the proceedings. The medical and mental health records before and after the allegations are necessary for the Defendants to be provided a fair opportunity to litigate this case.

3. Discovery has opened in this case. See Doc. 56. On February 6, 2017, undersigned mailed a request for production to Plaintiff requesting Plaintiff initial and sign a medical release for undersigned to receive and review Plaintiff’s medical and mental health records. Def. Ex. A. Plaintiff instead signed a refusal form indicating that he would not release his medical records. Def. Ex. B.

4. Undersigned scheduled a call-out with Plaintiff to confer regarding his position on the instant motion. The call out took place today, February 27, 2017. Plaintiff opposes the instant motion. Plaintiff indicated his preference that this issue “go through the court.”

MEMORANDUM OF LAW

Defendants move the Court to compel Plaintiff to release his medical and mental health records because the Plaintiff's refusal to release his medical records is preventing Defendants from litigating this case.

The federal regulation covering the disclosure of protected patient medical records is 45 C.F.R. § 164.512. United States v. Sutherland, 143 F. Supp. 2d 609, 612 (W.D.Va. 2001). This regulation allows for the disclosure of medical information, *inter alia*, "in the course of any judicial or administrative proceeding ... in response to an order of the court." 45 C.F.R. §164.512(e)(1)(i). While 45 C.F.R. § 164.512 was intended to limit the disclosure of individually identifiable medical information, it is not intended to disrupt current practice whereby an individual who is a party to a proceeding and has put his or her medical condition at issue will not prevail without consenting to the production of his or her protected health information. See 65 Fed. Reg. 82,530; Gratton v. Great American Communications, 178 F.3d 1373 (11th Cir. 1999) (district court did not abuse discretion by dismissing case after plaintiff failed to comply with order to provide release authorizing production of his medical records); but see Graham v. Witalec, No. 5:10-cv-65-RS-GRJ, 2011 WL 1335808 (N.D. Fla. Apr. 7, 2011) (unpublished op.) (discussing release of medical records in conjunction with a HIPPA compliant

protective order). Plaintiff has placed his medical conditions and medical records at issue in this case. Therefore, Plaintiff has waived any entitlement of confidentiality to these records. See Doe v. Marsh, 918 F.Supp. 580, 585 (N.D.N.Y. 1996) (“A plaintiff may waive the privilege when his medical condition is at issue in a lawsuit.”); Ferrell v. Glen-Gery Brick, 678 F.Supp. 111, 112 (E.D.Pa. 1987) (“both courts and commentators alike have consistently taken the view that when a party places his or her physical or mental condition in issue, the privacy right is waived”). Access to Plaintiff’s medical and mental health records is paramount to the resolution of this action.

Wherefore Defendants respectfully request (i) an order mandating that the Plaintiff provide the Defendant with access to his medical and mental health records, or (ii) an order for the custodian of the medical and mental health records to provide Defendants with access to the records, and issue a confidentiality order pursuant to 45 C.F.R. § 154.512(e).

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Mark S. Urban
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was filed electronically and furnished by U. S. Mail to: Matthew Thompson, DC# R64543, Walton Correctional Institution, 691 Institution Road, DeFuniak Springs, Florida 32433-1831, on February 27, 2017.

/s/ Mark S. Urban

MARK S. URBAN

CERTIFICATION OF MEMORANDUM WORD COUNT

Undersigned counsel, pursuant to local rule 7.1(F), certifies that the preceding memorandum in support of the instant motion contains **383** words.

/s/ Mark S. Urban

MARK S. URBAN